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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 283

RAILROAD COMMISSION OF TEXAS, ET AL

VS.

THE PULLMAN COMPANY, ET AL

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS

Brief of the Interveners, M. B. Cunningham, W. A. Worley, W. M. Hadley and Order of Sleeping Car Conductors.

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NOTE: All of the references to the Constitution and Statutes above cited have been copied in full in the Appendix to the Brief filed by the Attorney General with exception of Article 4477, which is quoted in this Brief.

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(Opinion of Court Below is Reported in 33 Fed. Supp. 675)

Upon motion leave was granted by the Trial Court for the interveners to align themselves with the defendants in the Trial Court, appellants herein

(Tr. 76, 77). The petition for appeal included said interveners (Tr. 371). The brief as filed by the Attorney General in this case has stated the grounds for jurisdiction, has made a comprehensive statement of the case, including specification of errors, together with a summary of argument and authorities, all of which is adopted by these interveners. Therefore, this brief will supplement the able brief of the Attorney General by enlarging upon certain points.

SUMMARY OF ARGUMENT

Point No. 1

THE PLAINTIFFS DID NOT ALLEGE OR PROVE ANY FACTS TO SHOW THAT THEY WOULD BE DAMAGED IF THE ORDER OF THE RAILROAD COMMISSION WAS PERMITTED TO STAND, THE ONLY DAMAGE ALLEGED OR PROVED BEING THAT THEY WOULD BE PREVENTED FROM COLLECTING ILLEGAL, UNAUTHORIZED AND EXTORTIONATE TOLLS AND FARES.

ARGUMENT AND AUTHORITIES

For the purpose of clearness the order of the Commission shall be herein referred to as it was considered in the Trial Court as the "challenged order". The challenged order was directed to, and made requirements of, only the railroads. It made

no requirement whatever of the plaintiff, The Pullman Company. It is fundamental that before a party can resort to a Federal Court of Equity to restrain and prevent an order of enforcement such as the one in this case he must show that he would be injured by its enforcement. *Heard* v. *Denman*, 29 SWR (2nd) 824.

The very basis of the plaintiffs' cause of action is the contracts between The Pullman Company and the railroads as stated in the plaintiffs' Bill of Complaint wherein it was pleaded:

> "Each of the plaintiffs, excepting The Pullman Company, operates trains in or through portions of the State of Texas including Pullman cars furnished by The Pullman Company pursuant to contracts between The Pullman Company and the respective plaintiffs." (Tr. page 6, para. 2).

The contracts between the various railroads and The Pullman Company were offered in evidence by the plaintiffs and identified as Exhibits 2 to 14 inclusive. (Tr. 146).

In support of this pleading the plaintiff, The Pullman Company offered the witness Champ Carry, Vice President of The Pullman Company (Tr. 79) who testified concerning the contracts between the railroad companies and The Pullman Company as follows:

"Q. All of these operations are under contracts between the Railroad—the particular Railroad and the Pullman Company?

A. Yes, sir, all of them.

Q. Is there an arrangement in general between the Railroad and the Pullman Company whereby the Pullman Company and the Railroad share a part of the revenues from the Pullman fares on these cars?

A. All of our contracts provide for the Railroads to share in the earnings if they reach a certain level. The general provisions of the contracts are that the Pullman Company first takes out the cost of the operation and then what we term as an initial return or profit for doing the business, and after that we divide any surplus that may be there. The contracts are generally—there are some little differences in the way that the division is made, but they are generally to the effect that there will be a division if the revenue is there." (Tr. 83).

The plaintiffs further offered the witness V. H. Vroman, an employe of The Pullman Company serving in the capacity as assistant to the Vice-President in charge of operations who testified:

"Q. All right. Then, for the privilege of riding in the Pullman car the Railroad

Company does charge an extra fare, you know that, don't you?

A. Yes, sir.

Q. That is one cent a mile, isn't it, in Texas?

A. I believe it is.

Q. Then in addition to paying that extra railroad fare to ride in the Pullman car, the Pullman Company then charges an additional fare?

A. They charge for their accommodations.

Q. Well, that is an additional charge, though, in addition to the railroad fare, and then the extra fare to ride in the Pullman?

A. It is an additional expense to the passengers. You can't go to the theater without paying for it, and if you ride in a Pullman car you must pay for a seat or berth; that applies on both roads and on all roads.

Q. I understand and your charges are identical in every instance, whether there is a Pullman porter in charge or whether there is a Pullman conductor in charge?

A. That is right.

Q. All right; and the same—the same charges are made whether there are 10 Pullman cars or one Pullman car?

A. that is right." (Tr. 139, 140).

Therefore, the plaintiffs alleged and proved by their own witnesses that the fares and charges were in excess of the maximum sum allowed by the statutes of the State of Texas as provided in Article 6416 Revised Civil Statutes of Texas which provides:

> "The passenger fare upon all railroads of this State shall be three cents per mile." etc.

Article 6473 Revised Civil Statutes of Texas, Extortion, provides in part:

> "If any railroad company, subject to the provisions of this title, or its agent or officer, shall charge, collect, demand, or receive a greater rate, charge or compensation than that fixed and established by the Commission for the transportation of freight, passengers or cars, ... or for any other service performed or to be performed by it, such railroad company and its agent and officer shall be deemed guilty of extortion."

The only damage alleged or attempted to be proved was that the order, if in force, would prevent the plaintiff railroads and The Pullman Company from collecting additional fares and charges for the use of Pullman accommodations to those which the railroads charged; and that this would deprive them of the profits derived from the Pull-

man operations, which profits they had contracted between themselves to share.

Now if those extra charges and fares of which they would be deprived are themselves unauthorized and illegal and extortionate then they will not be injured by the enforcement of the order.

Article 6445 Revised Civil Statutes of Texas places all railroads "and other property used in connection therewith" under the supervision of the Railroad Commission. Likewise, it has power over all persons owning or operating such railroads "and other property to fix ... all necessary rates, charges and regulations." While we believe this article gives jurisdiction over The Pullman Company it is not necessary so to contend. It unquestionably has jurisdiction over the railroads and that is enough for this case.

Article 6448 Revised Civil Statutes of Texas provides:

> "The Commission shall:
>
> (9) Make and establish reasonable rates for the transportation of passengers over each railroad subject hereto, which rates shall not exceed the rates fixed by law. The Commission shall have power to prescribe reasonable rates, tolls or charges for all other services performed by any railroad subject hereto."

It is certain that the railroads could not provide their own sleeping car and other accommodations which they contracted with The Pullman Company to provide, and make the same charge therefor that it makes, without authority of the Railroad Commission. It would clearly be governed by the language of Article 6448 (9) "for all other services performed by any railroad", but the legislature left no doubt of its intention in this regard, and as if anticipating some subterfuge might be used it enacted Article 6473 Revised Civil Statutes of Texas which reads as follows:

> "If any railroad company, subject to the provisions of this title, or its agent or officer, shall charge, collect, demand, or receive a greater rate, charge or compensation than that fixed and established by the Commission for the transportation of freight, passengers or cars, or for the use of any car on the line of its railroad, or any line operated by it, or for receiving, forwarding, handling or storing any such freight or cars, or for any other service performed or to be performed by it, such railroad company and its agent and officer shall be deemed guilty of extortion, . . ."

The testimony is without contradiction that the charges made by The Pullman Company and the railroad company to passengers riding in the Pullman cars is a sum in excess of the maximum sum as fixed by the statutes. Likewise, the testimony

is uncontradicted that the various railroads will participate in such profits. It is this loss that the plaintiffs are complaining of. The plaintiffs alleged and proved that the contracts between The Pullman Company and the railroad company provided that The Pullman Company would have the exclusive right to provide sleeping car accommodations and to fix their charges therefor. The charges and fares thus collected were divided between the railroads and The Pullman Company and none of such charges or fares were ever fixed by the Railroad Commission. Thus, the plaintiffs plead and proved that they were engaging in an enterprise unauthorized by the Railroad Commission; that charges were being made in excess of the maximum sum allowed by law, and yet in a court of equity they complain that the Railroad Commission is attempting to deprive them of the fruits of these unauthorized and extortionate charges. We concur with the Attorney General of Texas that the Railroad Commission did have statutory authority to promulgate the challenged order. However, if it should be agreed, as urged by the plaintiffs, that the Commission was without authority to promulgate the challenged order, it is to be noted that the challenged order does not attempt to regulate The Pullman Company. It does not attempt to change or alter the fares and charges which are being made in excess of the statutory limitation. It simply provides that no extra charge shall be made to any

passenger for these extra accommodations wherein the railroads shall participate directly or indirectly, unless the standard of service as set out in the order be maintained.

The interest of the interveners in this case can be found from the testimony of the witness B. H. Vroman, who testified that he was an assistant to the Vice President of The Pullman Company, and his testimony in part was:

> "A. Well, we have employed no conductors for ten years, and they are all of them in the higher wage brackets.
>
> Q. You haven't hired any new conductors?
>
> A. I say not any. I know we took up one man at Cincinnati, but we haven't employed very many, two or three at some places. (Tr. 116)."

Therefore, by this process it is only a question of time until the Pullman Conductors will be completely eliminated.

Point No. 2

SPECIAL APPEARANCE IS UNKNOWN TO TEXAS PRACTICE AND WHEN PARTIES VOLUNTARILY SUBMIT TO THE JURISDICTION OF THE RAILROAD COMMISSION THEY CANNOT BE LATER HEARD TO COMPLAIN THAT THEY WERE NOT GIVEN PROPER NOTICE OF SUCH HEARING.

ARGUMENT AND AUTHORITIES

Article 6448 Revised Civil Statutes of Texas provides:

"The Commission shall:

1. Adopt all necessary rates, charges and regulations, to govern and regulate freight and passenger traffic, to correct abuses and prevent unjust discrimination and extortion in rates of freight and passenger traffic on the different railroads in this State.

"...

"6. From time to time, alter, change, amend or abolish any classification or rate established by it when deemed necessary. Such amended, altered or new classification or rates shall be put into effect in the same manner as the originals.

"7. Adopt and enforce such rules, regulations and modes of procedure as it may

deem proper to hear and determine complaints against the classifications or the rates, the rules, regulations and the determinations of the Commission.

"...

"9. Make and establish reasonable rates for the transportation of passengers over each railroad subject hereto, which rates shall not exceed the rates fixed by law. *The Commission shall have the power to prescribe reasonable rates, tolls or charges for all other services performed by any railroad subject hereto.*" (Italics Ours).

The Supreme Court of Texas settled this point of special appearances in the case of Atchison, T. & S. F. Ry. Co. v. Stevens, 109 Tex. 262, 206 SWR 921, when Mr. Chief Justice Phillips, speaking for the Court, said:

"(1) An extended argument has been presented by the Railway Company upon the question of the Trial Court's jurisdiction under the service shown. In the state of the record, that is an immaterial question. A special appearance is unknown to our practice. The filing by a defendant of any defensive pleading, though it be only for the purpose of challenging the jurisdiction of the Court, constitutes an appearance and a submission to the jurisdiction of the forum. York v. State, 73 Tex. 651, 11 S. W. 869. The filing by the Railway

Company of its plea of privilege and later its answer was an appearance, and eliminates from the case any question of jurisdiction."

In this connection we respectfully submit that only railroads chartered under the laws of Texas are entitled to any notice, and in the case at bar they were given such notice, and in addition thereto we cite from the challenged order which is regular on its face, and recites:

"(2) That upon request of the Pullman Company, through its attorney, a notice was issued in the manner and form provided by law, notifying all parties at interest that a full and complete hearing would be held in Austin, Texas, in the Hearing Room of the Railroad Commission on the 31st day of August, 1939, at which time all parties interested would be permitted to offer such evidence and present such facts as they may deem material to the issues involved.

(3) That the effective date of passenger circular No. 164 was extended until the 15th day of September, 1939, and upon request of counsel for the parties at interest, the effective date of said order has been postponed from time to time, the last extension thereof being until the 15th day of November, 1939.

(4) The Commission further finds that

on the 31st day of August, 1939, at 10 o'clock A. M. in the Hearing Room of the Commission in Austin, Texas, the following appearances were made:

Mr. Ireland Graves, of the law firm of Black, Graves & Stayton, of Austin, Texas,

Mr. L. M. Greenlaw, general counsel of the Pullman Company, Chicago, Illinois,

Mr. H. S. Anderson, assistant general solicitor of the Pullman Company, of Chicago, Illinois,

All on behalf of the Pullman Company.

Mr. Claude Pollard, Austin, Texas, representing all Texas railroads.

Culbertson & Morgan, attorneys, Fort Worth, Texas, appearing for the Order of Sleeping Car Conductors.

The Commission thus finds *that all of the parties interested in the subject matter have been duly notified for the time and in the manner provided by law and that all of said parties entered an appearance in this cause* and, with all parties having announced ready, the Commission proceeded to hear the oral testimony of seventeen witnesses, some of whom were offered by the railroad companies, the Pullman companies and the other parties at interest, as

> well as documentary evidence, and after a full, final and complete hearing of evidence, which lasted for two days, and after argument of counsel, the Commission being fully advised in the premises Finds." (Tr. 38-39). (italics ours.)

In this connection it is interesting to observe the pronouncement of the learned Trial Court in the case at bar:

> "The regulation cannot be sustained as a rate order for the reasons, first, it was not made after notice given as required by law, and second, it is apparently predicated upon an attempt upon the part of the Commission to construe and enforce certain contracts between the Railroads and the Pullman Company, which it is without any statutory authority to do. Furthermore, in so far as it attempts to regulate the rates charged by the Pullman Company it is void, as the Commission has no jurisdiction over the Pullman Company." (Tr. 363).

We respectfully submit that this pronouncement on the part of the Court is contrary to the express provisions of the statutes of this state and the decisions, namely Article 6449 Revised Civil Statutes of Texas, which provides:

> "Before any rates shall be established, the Commission *shall give each railroad company to be affected thereby ten days' notice* of the time and place when and

where the rates shall be fixed;" (italics ours).

The Texas Courts likewise have had occasion to finally determine the issue as set forth in the case of Roco Refining Co. et al v. State et al, 94 SWR (2d) 1214 when the Court said:

> "There is another reason why appellants' attack upon the validity of the orders, for their alleged failure to be based upon notice and hearing, cannot be sustained. The attack is a collateral one. Want, if any, of notice and hearing does not affirmatively appear upon the face of either of the orders. If it be true that the orders were issued without notice and hearing, it would require evidence to establish such facts. The District Court of Travis County alone has jurisdiction to determine that issue. Alpha Petroleum Co. v. Terrell, 122 Tex. 257, 59 S. W. (2d) 364, 72; Johnson Refinery v. State (Tex. Civ. App.) 85 S. W. (2d) 948; and authorities there cited; Texas Steel Co. v. Ft. W. & D. C. R. Co., 120 Tex. 597, 40 S. W. (2d) 78, 81."

We think the exact question has been determined in the case of Texas Steel Co. v. Fort Worth & Denver City Ry. Co., et al, 120 Tex. 597, 40 SWR (2nd) 78. In that case the Court of Civil Appeals certified the question to the Supreme Court for answer in the following form:

"Question 1: Is the said Circular No. 5548 adopting said rates, void and subject to collateral attack for any of the following reasons, to wit:

'(1) Because no notice was given to the railroads as provided by article 6449 of said Statutes of 1925, prior to the issuance of said circular? ***

'(3) Because there appears to have been no evidence of the docketing of the cause, or hearing, or evidence, as provided by the rules of the Railroad Commission of Texas?' "

The opinion of the Supreme Court says:

"The suit, in so far as it involves the above orders of the Texas Railroad Commission, is based upon the theory and contention that the above orders are absolutely and totally void for the several reasons set out in 'Question No. 1' propounded in the certificate from the Court of Civil Appeals. We overrule these contentions.

"It is the settled law of this state that the Railroad Commission is a quasi judicial body. Producers' Refining Co. et al. v. M. K. & T. Ry. Co. of Texas (Tex. Com. App.) 13 S. W. (2) 679.

"Since the Railroad Commission is a quasi judicial body, it follows that an order

regular upon its face, made by the commission, is not subject to collateral attack. Articles 6452, 6453 R. C. S. of Texas 1925; West Texas Compress Co. v. Railway Co. (Tex. Com. App.) 15 S. W. (2d) 558; Producers' Refining Co. v. M. K. & T. Ry. Co., 13 S. W. (2d) 679; Id. (Tex. Com. App.) 13 S. W. (2d) 680; Railroad Commission v. Wald, 95 Tex. 278, 66 S. W. 1095; M. K. & T. Ry. Co. of Texas v. Railroad Commission (Tex. Civ. App.) 3 S. W. (2d) 489; Empire Gas & Fuel Co. v. E. L. Noble et al. (Tex. Com. App) 36 S. W. (2nd) 451."

Therefore, we submit (1) that The Pullman Company was not entitled to notice; (2) that notwithstanding the law The Pullman Company voluntarily made its appearance before the Railroad Commission and spent two days participating in the hearing before such Commission, being represented by lawyers of its own choice, which said lawyers requested of the Commission a re-hearing in the case, and it was upon the motion of The Pullman Company lawyers that such rehearing was granted to The Pullman Company and the railroads; and (3) since the case at bar in the Trial Court was a collateral attack upon an order issued by the Railroad Commission which was valid upon its face, plaintiffs could not complain of lack of notice. We submit the law is so well settled on this point that no one can disagree.

If the plaintiffs were desirous of complaining of the question of 'lack of notice' as the learned Trial Court held that they were entitled to, then their remedy would be found not in a Federal Court of Equity, but only in Article 6453 of the Revised Civil Statutes of Texas, which reads:

> "If any railroad company or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act or regulation adopted by the Commission, such dissatisfied company or party may file a petition setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge, classification, or order, or to either or all of them, in a court of competent jurisdiction in Travis County, Texas, against said Commission as defendant."

The Supreme Court of the United States has had occasion to pass on a similar statute in the case of Southern Pacific Company v. Campbell, 230 U. S. 537, in which case Mr. Justice Hughes delivered the opinion of the Court, and held that such procedure was consistent with the due process clause guaranteed by the 14th Amendment, and in discussing the matter, the Court said:

> "The provision of the Statute that suit might be brought in the State Court to set aside orders of the Commission upon the ground that the rates fixed were unlawful,

> or that the regulation or practice prescribed was unreasonable, did not infringe the rights of the complainants. The procedure permitted by the Statute is consistent with the 14th Amendment. Portland Light & R. Co. v. Railroad Commission, 229 U. S. 397, 57 Law Edition 1248."

In support of our contention that only Texas railroads affected by the challenged order are entitled to notice and that The Pullman Company was not entitled under the laws of Texas to any notice we cite the case of Railroad Commission of Texas et al. v. Houston Chamber of Commerce, et al., 19 S. W. R. (2nd) 583, affirmed by Commission of Appeals 78 S. W. R. (2nd) 591, which opinion was adopted by the Supreme Court of Texas.

Point No. 3

RAILROADS ARE ARTIFICIAL CREATIONS EXISTING AND LIMITED BY CHARTERS GRANTED BY THE STATE AND THE RIGHTS THUS ACQUIRED CANNOT BE DELEGATED BY CONTRACT TO A THIRD PERSON.

ARGUMENT AND AUTHORITIES

Article 6260 Revised Civil Statutes of Texas provides:

> "No corporation, except one chartered under the laws of Texas, shall be authorized or permitted to construct, build, operate, acquire, own or maintain any railways within State."

In the case at bar the Texas railroads have, according to the allegations and proof of the plaintiffs, contracted away certain of their chartered rights to The Pullman Company, a foreign corporation chartered under the laws of the State of Illinois, namely—the Sleeping Car or Pullman Car accomodations. The United States Supreme Court settled the law on this question in an early decision of *Pennsylvania R. R. Company* v. *St. Louis, etc. R. R. Co.* 118 U. S. 290 when it said:

> "We think it may be stated . . . that, unless specially authorized by its charter, or aided by some other legislative action,

> a railroad company cannot, by lease or any other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers . . ."

The pronouncement of the Trial Court to the effect:

> "The regulation . . . is apparently predicated upon an attempt upon the part of the Commission to construe and enforce certain contracts between the Railroads and The Pullman Company, which it is without any statutory authority to do." (Tr. 363).

is indeed a strange and new innovation in Texas jurisprudence. Even a cursory analysis of the Court's pronouncement of the law leads to the inevitable conclusion that notwithstanding the statutes of Texas railroads may by contract place their operations beyond the reach of the Railroad Commission and delegate their original chartered rights to some foreign corporation and together share in the profits. Thus the railroads could do indirectly what they cannot do directly. The railroads could thus by contract with foreign corporations collect rates and charges they would not be allowed to collect if the railroad itself were operating the same equipment. This same reasoning would allow the

railroads to contract away the cattle cars that haul the cattle of Texas to market, without any regulation on the part of the Railroad Commission. It would allow the railroad companies by contract to delegate their chartered rights to foreign corporation for grain cars to haul the grain from the wheat fields of Texas to the market. It would allow the railroad companies to contract with another company to furnish the engines, another the freight cars, another the passenger cars, and on and on indefinitely and by this method the Railroad Commission would have no regulation whatever over the railroads or any part of the equipment used thereon. We respectfully urge that the reasoning of the Trial Court on this point is without precedent or logic and contrary to the express statutes of the State of Texas hereinabove cited in this brief.

Point No. 4

A COURT, IN REVIEWING THE ACTION OF AN ADMINISTRATIVE AGENCY TO WHICH THE FORMULATION AND EXECUTION OF A STATE POLICY HAS BEEN INTRUSTED, MUST NOT SUBSTITUTE ITS NOTION OF EXPEDIENCY AND FAIRNESS FOR THOSE WHICH HAVE GUIDED SUCH AGENCIES.

ARGUMENT AND AUTHORITIES

An examination of the challenged order discloses that the findings of the Railroad Commission upon which the order is finally based (Tr. 39-52) set forth in detail the facts as were presented before the Commission showing that the investigation before such Commission was thorough, exhaustive and comprehensive. Based upon these findings the Commission entered the order complained of. A comparison of the Commission's findings of fact is found with that of the learned Trial Court as set forth on pages 365, 366, 367 Transcript, but the same are not as detailed, exhaustive or comprehensive as that of the Commission. It is suggested that many of the same witnesses who appeared before the Railroad Commission likewise appeared before the Trial Court and thus substantially the same testimony was heard. Based upon such testimony the Trial Court arrived at a different conclusion to the administrative body and simply reversed the con-

clusions of the Railroad Commission. We submit that the position of the Trial Court is contrary to the rule as announced by Mr. Justice Frankfurter of this Court in the case of *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 84 L. Ed. 16, page 1368, wherein the Court said:

> A controversy like this always calls for fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted.
>
> "General as these considerations may be, they are decisive of the present case. Both the District Court and the Circuit Court of Appeals appear to have been dominated by their own conception of the fairness and reasonableness of the challenged order. For all we know, the judgment of these two lower courts may have been wiser than that of the Commission, and their standard of fairness a better one. But whether a system of proration based upon hourly potential is as fair as one based upon estimated recoverable reserves or some other factor or combination of factors, is in itself a question for administrative and not judicial judgment."

To like effect the rule in Texas has been announced in the case of *Railroad Commission* v. *McDonald*, 90 SWR (2d) 581, wherein the Court announced the rule:

> "The test is, not what the Court's independent judgment might be, but whether there was substantial evidence before the Commission to sustain its order."

It is interesting to observe that the challenged order provides:

> "It is Further Ordered by the Railroad Commission of Texas that in any case where it is the desire of any railroad company, receiver or trustee to operate over its line of railway a sleeping car or cars without fully complying with the provision of the orders above set out, the Commission shall be notified and its consent secured before such change or deviation from the terms of said orders is put in force.
>
> "It is not the intention of the Commission to place any burden on interstate commerce. If any part of this order or the application and the enforcement thereof when applied to any one or more railroads or any operation thereof be held to be an undue burden on interstate commerce, then such holding shall not affect this order as applied to other operations by railroads not amounting to an undue burden on interstate commerce." (Tr. 54).

The testimony affirmatively disclosed that not a single one of the plaintiffs in this case have made application to the Railroad Commission of Texas seeking an exemption from the operation of the challenged order. (Tr. 128-129-265).

Point No. 5

THE CHALLENGED ORDER WAS A VALID EXERCISE OF THE POLICE POWER OF THE STATE AND A REASONABLE AND NECESSARY ENFORCEMENT OF THE SANITARY CODE AS APPLIED TO RAILROADS AND SLEEPING CARS.

ARGUMENT AND AUTHORITIES

Article 10, Section 2 of the Constitution of Texas provides:

> "Railroads heretofore constructed or which may hereafter be constructed in this state are hereby declared public highways, and railroad companies, common carriers. The Legislature shall pass laws to regulate railroad, freight and passenger tariffs, to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, . . . and to the further accomplishment of these objects and purposes, may provide and establish all requisite means and agencies invested with such powers as may be deemed adequate and advisable."

Article 6448 Revised Civil Statutes of Texas relating to the duties of the Railroad Commission provides that the Railroad Commission of Texas shall:

"See that all laws in this state concerning railroads are in force . . ."

To like effect Article 6445 Revised Civil Statutes of Texas provides:

"Power and authority are hereby conferred upon the Railroad Commission of Texas over all railroads . . ."

Article 4477 Revised Civil Statutes of Texas is a statute in this state commonly known as the Public Health Sanitary Code. Rule 58 provides for the health regulations as applied to depots, coaches and sleepers. Rule 59 on ventilation and heat provides:

"Each depot, railway coach, sleeping car, interurban car and street car while in use for the accommodation of the public shall be properly ventilated, and, if necessary, heated, and a sufficient amount of heat shall be furnished in time of need so that fresh air can be supplied without causing it to become unduly uncomfortably cold; and the janitor, conductor or other person in charge shall see to it that the air is replenished with fresh air from time to time as needed to prevent the same from becoming foul, unsanitary and oppressive."

Finding 13 of the challenged order provides:

"(a) See that the Pullman cars are properly cooled or properly heated for the

reception of passengers prior to the time that the cars may be opened to receive passengers."

"(c) To regulate the temperature, both of the air-conditioning device and the heat equipment, and the Commission finds in connection with the air-conditioning that such equipment is relatively new, having been in use only a few years on the railroads in Texas; that the proper regulation thereof is a matter of grave concern to the health, comfort and convenience of the passengers on Pullman cars; that the Pullman conductor is specifically charged with the responsibility of regulating the same and that he receives special instructions in the operation of same." (Tr. 43).

Thus, it will be observed that the findings of the Commission are almost identical with the requirements of the statute relating to the Sanitary Code and it is the duty of the Railroad Commission under its police powers to enforce such regulation. It has simply attempted to do so under the challenged order.

Point No. 6

IN CONSIDERING WHETHER THE ORDER IS UNREASONABLE AS TO COSTS THE ENTIRE REVENUES OF THE RAILROAD SYSTEM AND THE PULLMAN SYSTEM MUST BE CONSIDERED, AND NOT MERELY THE DIRECT RETURN FROM SOME BRANCH LINE OR FROM ONE STATE.

ARGUMENT AND AUTHORITIES

The witness L. M. Bradish, Assistant Comptroller of the Pullman Company testified in the trial court concerning the above question as follows:

> "Q. And when you are including the expense of each car, then the profits, if any, over and above the expenses, you figure that on the entire system, don't you, of a railroad?
>
> A. Of a railroad, yes, the entire system of cars.
>
> Q. In other words, your contracts with the Missouri Pacific are not limited to earnings made in Texas, or any other State, but are taken of the entire system of the Missouri Pacific lines?
>
> A. That is right.
>
> Q. Well, that same thing is true of all other railroads, isn't it?
>
> A. Yes.

Q. And this expense item, if this order goes into effect, and you say it would cost you so much money, that likewise would be spread all over the entire system of a railroad, wouldn't it?

A. Yes, it would.

Q. And would not be limited, of course, to any one State?

A. No. (Tr. 150).

This pronouncement of the law we think to be supported by the United States Supreme Court in the case of *Groesbeck* v. *Duluth S.S. & A.R. Co.*, 250 U.S. 607. A general statement of the law is found in 15 A.L.R. 190 as follows:

> "The weight of the decisions, both court and commission, is to the effect that, in considering the question whether or not a railroad company should be compelled to continue the operation of a branch line, the entire revenues of the system are to be considered, and not merely the direct return from the branch line itself; in other words, the branch line is not to be considered as an independent enterprise, but rather in the nature of a feeder to the system. In addition to the authorities already cited, this doctrine finds support in the following, among possibly others, cases: . . ."

CONCLUSION

For the reasons stated by the Attorney General and for those hereinaboye stated we pray that the judgment of the trial court be reversed.

Respectfully submitted:

A. B. CULBERTSON

and

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By Cecil A. Morgan

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